Office-Supreme Court, U.S.
FILED
APR 9 1983
CLERK

No. 82-1320

In the Supreme Court of the United States

OCTOBER TERM, 1982

FIDELITY SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS P. VARTANIAN
General Counsel
Federal Home Loan Bank Board
Washington, D.C. 20552

QUESTION PRESENTED

Whether the court of appeals correctly concluded that the statutory requirements (12 U.S.C. 1729 (c)(2)(A) and (C)) for the appointment of a federal receiver for a state-chartered savings and loan association had been satisfied.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Berenyi v. *Immigration Director*, 385 U.S. 630	7
Evans v. *Superior Court*, 14 Cal. 2d 563, 96 P.2d 107, appeal dismissed, 309 U.S. 640	6, 7
Evans v. *Superior Court*, 20 Cal. 2d 186, 124 P.2d 820	6, 7
Telegraph Savings & Loan Association v. *Schilling*, No. 80-2012 (7th Cir. Mar. 29, 1983)	6, 8
United States v. *Johnston*, 268 U.S. 220	7
United States v. *Reliable Transfer Co.*, 421 U.S. 397	7
Wilson v. *Superior Court*, 2 Cal. 2d 632, 43 P.2d 286	6, 7

Statutes and regulations:

Federal Home Loan Bank Act, 12 U.S.C. (& Supp. V) 1421 *et seq.*	3
12 U.S.C. 1427(a)	3
12 U.S.C. 1430	3
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1482	9
Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. V) 1461 *et seq.*:	
12 U.S.C. (& Supp. V) 1464	2
12 U.S.C. (Supp. V) 1464(a)	2

Statutes and regulations—Continued: Page

12 U.S.C. 1464(d)(6) 5
12 U.S.C. 1464(d)(6)(A)(i) 9
12 U.S.C. 1464(d)(6)(A)(ii) 9
12 U.S.C. 1464(d)(6)(A)(iii) 9

National Housing Act, Title IV, 12 U.S.C. (& Supp. V) 1724 *et seq.* 2
12 U.S.C. 1729(b)(4) 5
12 U.S.C. 1729(c)(1)(B)(ii)(II) 9
12 U.S.C. 1729(c)(2) 4, 9
12 U.S.C. 1729(c)(2)(A) 2, 5, 6
12 U.S.C. 1729(c)(2)(C) 2, 5, 8
28 U.S.C. 1292(b) 5
12 C.F.R. 525.1 *et seq.* 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1320

FIDELITY SAVINGS AND LOAN ASSOCIATION,
PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD AND FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-2 to A-25) is reported at 689 F.2d 803. The opinions of the district court (Pet. App. A-26 to A-54) are reported at 540 F. Supp. 1374.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1982 (Pet. App. A-25). A petition

for rehearing was denied on November 8, 1982 (Pet. App. A-1). The petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from the appointment of the Federal Savings and Loan Insurance Corporation ("FSLIC") as federal receiver for petitioner, a state-chartered savings and loan association. The district court held that the Federal Home Loan Bank Board ("Bank Board")[1] failed to comply with the statutory requirements of 12 U.S.C. 1729(c)(2)(A) and (C) when it appointed FSLIC as federal receiver. The court of appeals reversed (Pet. App. A-25), concluding that these requirements had been satisfied. It remanded (*ibid.*) for further proceedings on other issues in the case.

2. As both the district court (Pet. App. A-35) and the court of appeals (*id.* at A-3) noted, the financial difficulties that led to petitioner's receivership began in 1979 as a result of speculative loan commitment practices. Petitioner "gambled" that interest rates would fall and made commitments, in exchange for a commitment fee, to fund future loans at fixed rates

[1] The Bank Board is an independent agency of the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. V) 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. (Supp. V) 1464(a). The Bank Board is also the operating head of FSLIC, the corporate governmental agency of the United States that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. (& Supp. V) 1724 *et seq.*, for insuring the accounts of all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

(*id.* at A-34 to A-35). When interest rates rose sharply instead, petitioner was forced to borrow at much higher rates in order to fund its low-interest loan commitments (*id.* at A-35). As a result, petitioner began to suffer substantial operating losses and a decline in net worth.[2] By March 1982, petitioner had borrowed in excess of $1.3 billion from its lender of last resort, the Federal Home Loan Bank of San Francisco ("Home Loan Bank").[3] *Ibid.* By contrast, the total of all savings deposited with petitioner at this time was $1.407 billion.

In early April 1982, the 1981 financial report for petitioner's parent corporation, Fidelity Financial Corporation, a publicly traded stock corporation, was

---

[2] The state commissioner's order seizing petitioner recognized that the net worth of petitioner had eroded from $91.6 million, as of January 1, 1981, to only $19.6 million as of March 31, 1982, and that petitioner's net operating losses had increased from $1.4 million for the year ended December 31, 1980, to $57 million for the year ended December 31, 1981. Pet. App. A-5 n.2.

[3] Each of the 12 Home Loan Banks is an independent lending institution, created under the Federal Home Loan Bank Act, 12 U.S.C. (& Supp. V) 1421 *et seq.*, the stock of which is owned by member savings and loan associations located within its district. The management of the Home Loan Bank is vested in a board of directors, the majority of whom are elected by member institutions. 12 U.S.C. 1427(a). The decision by the Home Loan Bank whether to make an advance (or loan), while subject to the general requirements set forth in 12 U.S.C. (& Supp. V) 1430 and 12 C.F.R. 525.1 *et seq.*, is not unlike the decision made by any lender. The Home Loan Bank evaluates the financial condition of the borrower, the sufficiency of the proposed collateral, the extent of previous loans and other relevant criteria. Based upon its independent evaluation, the Home Loan Bank decides whether and under what conditions to make advances to its members.

released. Fidelity Financial Corporation's independent auditors qualified their opinion by concluding that petitioner could not continue to operate unless it merged with another financial institution or obtained substantial financial assistance from FSLIC. Depositors, alarmed by this information, withdrew nearly $70 million from petitioner during the week of April 5, 1982 (Pet. App. A-4).

Meanwhile, the Home Loan Bank had become concerned about its large advances to petitioner and the adequacy of collateral that could be pledged for further loan requests. On April 9, 1982, the Home Loan Bank decided not to make any additional loans to petitioner absent an assurance from FSLIC that FSLIC would guarantee such loans (Pet. App. A-4). FSLIC declined to make such guarantees, and so informed the Home Loan Bank and the California Savings and Loan Commissioner. Without this source of funding, petitioner faced an immediate liquidity crisis. *Ibid.*

In view of these developments, shortly before the close of business on April 13, 1982, the California Commissioner, having concluded that petitioner was "(1) [i]n an unsafe condition; (2) [c]onducting its business in an unsafe manner; [and] (3) [c]onducting its business in an injurious manner * * *," issued an order seizing petitioner and tendering appointment to FSLIC as state receiver for the purpose of liquidation (Pet. App. A-4 n.2, A-7 n.3). Shortly after these orders were delivered to petitioner, FSLIC as state receiver went about the task of closing the association (Tr. 136-139). The Bank Board then appointed FSLIC as federal receiver pursuant to 12 U.S.C. 1729(c)(2), concluding that petitioner was in an unsafe and unsound condition to transact business, was insolvent, and had suffered a substantial dissipation

of its assets due to violations of federal regulations and unsafe and unsound practices (Pet. App. A-7). Petitioner's assets were transferred to a newly created federal mutual association, Fidelity Federal Savings and Loan Association of San Francisco ("Fidelity Federal"), so that the business could be continued, albeit in another form, pending negotiation of some form of consolidation with another institution (*id.* at A-8; see 12 U.S.C. 1729(b)(4)).[4] After more than four months of negotiations with several institutions and pursuant to a bidding process, Fidelity Federal was acquired by Citicorp, N.A. The association is now operating as Citicorp Savings and Loan Association, a federal association.

3. Petitioner commenced this action in the United States District Court for the Northern District of California challenging the Bank Board's action pursuant to 12 U.S.C. 1464(d)(6). Following an order bifurcating the trial (Pet. App. A-33), the district court concluded that the requirements of 12 U.S.C. 1729(c)(2)(A) and (C) had not been satisfied (Pet. App. A-39 to A-49). Specifically, the court found that petitioner had not been "closed" under state law and that no depositor had been unable to withdraw funds (*id.* at A-43 to A-44, A-47 to A-48). Having found the federal receivership invalid on these procedural grounds, the court did not address the substantive merits of the Bank Board's action.

The respondents appealed to the Ninth Circuit pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, concluding that the procedural prerequisites for the appointment of FSLIC as federal receiver had

---

[4] The practical effect of the appointment of the federal receiver was to gain time for the Bank Board to seek a solution to the problem less drastic than liquidation.

been satisfied. First, the court of appeals rejected petitioner's claim that the state commissioner lacked the authority to close the association. Relying on California statutory and decisional law, the court held (Pet. App. A-13) that "[t]he power to close an association surely is among the powers properly implied from the Commissioner's power to take possession of an association for the purpose of liquidation." The court relied on *Evans* v. *Superior Court*, 20 Cal. 2d 186, 190-191, 124 P.2d 820, 822-823 (1942) (*Evans II*); *Evans* v. *Superior Court*, 14 Cal. 2d 563, 572, 96 P.2d 107, 113 (1939), appeal dismissed, 309 U.S. 640 (1940) (*Evans I*); *Wilson* v. *Superior Court*, 2 Cal. 2d 632, 635-637, 43 P.2d 286, 287-288 (1935). The court held, moreover (Pet. App. A-18), that the state commissioner's order seizing petitioner and appointing FSLIC as receiver, combined with the order of liquidation, satisfied the closure requirement of 12 U.S.C. 1729(c)(2)(A). The case was remanded to the district court for further proceedings on the substantive issues. Pet. App. A-25.

ARGUMENT

The issues raised in the petition were fully considered and correctly decided by the court of appeals. Its decision does not conflict with any decision of this Court or of any other court of appeals. Indeed, the only other court of appeals that has decided the question presented here expressly followed the Ninth Circuit decision in this case. *Telegraph Savings & Loan Association* v. *Schilling*, No. 80-2012 (7th Cir. Mar. 29, 1983). Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 15-16) that the procedural requirements for appointment of a federal re-

ceiver had not been satisfied because petitioner was not "closed" by the state authorities and because petitioner had not denied the request of a depositor for withdrawal of funds. These contentions have no merit.

a. Petitioner's argument that the statutory requirement of a closing was not met is based on two assumptions: that the state authorities lacked the power to close the association and that the actions taken on April 13 occurred so near to the end of petitioner's regular business day that they did not constitute a "closing." Neither contention warrants further review. The first raises an issue of state law that the court of appeals found to be settled by the California Supreme Court. *Evans II*, *supra*; *Evans I*, *supra*; *Wilson* v. *Superior Court*, *supra*; see Pet. App. A-13. The second is a fact-bound matter that was correctly resolved below and that does not merit this Court's review. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, petitioner's argument misconstrues the statutory scheme that was designed to permit federal assistance for troubled savings and loan associations with a minimum dislocation of banking activities. Contrary to petitioner's contention, Congress did not intend that a more significant disruption of service than occurred here was required before a federal receiver could be appointed. The court of appeals recognized that if such a severe dislocation were required to precede federal action, it would impose an unnecessary risk of depositor panic and a threat to the savings and loan industry. Accordingly, the court concluded (Pet. App. A-21) that Congress intended

to create a mechanism to achieve a smooth transition of control without a substantial negative impact on petitioner's customers and on the public in general. Indeed, it was precisely this type of responsible approach to a financial crisis that Congress envisioned in 1968 when it expanded the Bank Board's authority over state institutions. See *Telegraph Savings & Loan Association* v. *Schilling*, *supra*, slip op. 10 ("[t]hus, what Telegraph characterizes as a sham proceeding was merely the cooperative effort of state and federal authorities to protect depositors while at the same time minimizing FSLIC's liability"); S. Rep. No. 90-1263, 90th Cong., 2d Sess. (1968).

b. For similar reasons, the court of appeals rejected petitioner's argument that an account holder's request for withdrawal of funds must actually be denied before a federal receiver may be appointed. As the court noted, in the circumstances of this case petitioner's depositors were in fact unable to withdraw funds (Pet. App. A-24). This is all the statute requires. See 12 U.S.C. 1729(c)(2)(C); *Telegraph Savings & Loan Association* v. *Schilling*, *supra*, slip op. 10-13.

2. Petitioner claims (Pet. 19-27) that the court of appeals' decision contravenes principles of comity and federalism. This contention is wholly misplaced in a case involving cooperative efforts between state and federal authorities. The absence of any friction between state and federal regulation in these circumstances is demonstrated by the amicus curiae brief filed in the court of appeals by the Attorney General of California, who fully supported the actions taken by the federal respondents. See also Pet. App. A-20 to A-21.

Moreover, the court of appeals was fully cognizant of the state's interest in the regulatory scheme [5] and clearly noted that its holding preserved the state's role in the receivership process (Pet. App. A-23):

> Our interpretation also does no harm to the states. The appropriate state authority need not promulgate the liquidation order nor appoint the FSLIC as receiver. The fact that the Board may urge strongly that the state authority issue these orders alters nothing. It is within the state's power to refuse and to force into existence the literal fulfillment of the closure and inability to withdraw preconditions to federal intervention. That this might be a very imprudent thing for the state to do merely strengthens the case for the interpretation we give the statute.

---

[5] At the time FSLIC was appointed federal receiver of petitioner, 12 U.S.C. 1729(c)(2) required that action be taken by state authority before the Bank Board could appoint a federal receiver for a state-chartered association. The relevant statute recently was amended by the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 122(d), 96 Stat. 1482 ("Garn-St Germain Act"), to permit the Board to appoint the FSLIC as federal receiver of a state-chartered association whenever it determines that any of the grounds specified in 12 U.S.C. 1464(d)(6)(A)(i), (ii), or (iii) exists, regardless of any technical closing of the institution, provided the Board has received the prior written approval of the state official having jurisdiction over the institution, or provided said state official has failed to respond within 90 days to notice of the Board's determination that such grounds exist. This new section, to be codified at 12 U.S.C. 1729(c)(1)(B)(ii)(II), will remain in effect at least until October 15, 1985. Section 122(d), 96 Stat. 1482, of the Garn-St Germain Act. Thus, at least until that date, it is unlikely that the issues raised in this litigation will arise again.

3. The questions presented by the petition are, in any event, not ripe for consideration by this Court. The case is now on remand to the district court for a review of the substantive merits of the Bank Board's action. Trial is scheduled for October 1983. Should petitioner prevail at trial, the procedural issues will be moot. As a matter of judicial economy, the petition should be denied so that the proceedings in the district court may reach final resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

THOMAS P. VARTANIAN
General Counsel
Federal Home Loan Bank Board

APRIL 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 403086 1324